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12238

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
ELMER R. JOHNSON,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division.

AUG 15 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27594-H

ELMER R. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause
of action alleges:

I.

That this action is brought under and by virtue
of the terms and provisions of Chapter 20, Sub-
chapter 2, U. S. C. A., commonly known as the
Federal Tort Claims Act.

II.

That at all times herein mentioned defendant,
the United States of America was maintaining
through its Department of the Navy a certain
naval base located on the island of Guam, a
territorial possession of the United States.

III.

That on or about the 22nd day of December,
1946, at or about the hour of 5:30 o'clock P. M.
thereof plaintiff was employed by the United

States as a civilian employee of the Navy Department; that plaintiff was residing on defendant's said naval base in certain barracks provided by defendant for the convenience of plaintiff and other civilian employees; that defendant maintained for plaintiff and other civilian employees a certain eating place some three miles distant from said barracks; that said eating place was the only eating place available to plaintiff where he could take his meals; that defendant, acting by and through one of its employees, to wit, a certain chief pharmacist's mate acting in the line of his regular duties as an employee of the Navy Department was transporting plaintiff and certain naval personnel from said eating place back to the said barracks in a certain PC converted naval ambulance; that said vehicle was maintained and owned by defendant; that said vehicle was being operated by said naval employee with the permission and authority of defendant and in the course and scope of the regular duties assigned by defendant to said naval employee; that at said time and place defendant acting by and through its said agent and employee so carelessly and negligently operated and controlled the said vehicle on said road leading from said eating place to said barracks so as to cause the said vehicle to turn over; that as a direct and proximate result of said carelessness and negligence plaintiff was caused to sustain the injuries hereinafter enumerated.

IV.

That by reason of the facts hereinabove set forth, and as a direct proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: compound fracture to right tibia and fibula, fracture of the bones of the right shoulder; severe cerebral concussion and contusion to the brain with resultant damage to hearing, extreme pain and suffering and a severe shock to his nervous system.

V.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Seven Hundred (\$700.00) Dollars per month; that as a direct and proximate result of said carelessness and negligence and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VI.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as

aforesaid, plaintiff has been generally damaged in the sum of \$90,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of \$90,000.00, together with his special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Sheridan Downey, Jr., being first duly sworn, deposes and says: that he is the attorney for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda, wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 5th day of September, 1947.

[Seal] DORIS ANDERSON,

Notary Public in and for the County of
Alameda, State of California.

[Endorsed]: Filed Sept. 10, 1947.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
FOR DAMAGES

Plaintiff complains of defendant and for cause of action alleges:

I.

That this action is brought under and by virtue of the provisions of Chapter 20, Subchapter 2, U.S.C.A., commonly known as the Federal Tort Claims Act.

II.

That plaintiff is a citizen and resident of the County of Contra Costa, State of California.

III.

That at all times herein mentioned defendant, the United States of America was maintaining through its Department of the Navy a certain naval base located on the island of Guam, a territorial possession of the United States.

IV.

That on or about the 22nd day of December, 1946, at or about the hour of 5:30 o'clock P.M. thereof, plaintiff was employed by the United States as a civilian employee of the Navy Department; that plaintiff was residing on defendant's said naval base in certain barracks provided by defendant for the convenience of plaintiff and other civilian employees; that defendant maintained for plaintiff and other civilian employees a certain

eating place some three miles distant from said barracks; that said eating place was the only eating place available to plaintiff where he could take his meals; that defendant, acting by and through one of its employees, to wit, a certain chief pharmacists mate acting in the line of his regular duties as an employee of the Navy Department was transporting plaintiff and certain naval personnel from said eating place back to the said barracks in a certain PC converted naval ambulance; that said vehicle was maintained and owned by defendant; that said vehicle was being operated by said naval employee with the permission and authority of defendant and in the course and scope of the regular duties assigned by defendant to said naval employee; that at said time and place defendant acting by and through its said agent and employee so carelessly and negligently operated and controlled the said vehicle on said road leading from said eating place to said barracks so as to cause the said vehicle to turn over; that as a direct and proximate result of said carelessness and negligence plaintiff was caused to sustain the injuries hereinafter enumerated.

V.

That by reason of the facts hereinabove set forth, and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: compound fracture to right tibia and fibula, fracture

of the bones of the right shoulder; severe cerebral concussion and contusion to the brain with resultant damage to hearing, extreme pain and suffering and a severe shock to his nervous system.

VI.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately \$700.00 per month; that as a direct and proximate result of said carelessness and negligence and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

VII.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of \$90,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of \$90,000.00, together with his special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Sheridan Downey, Jr., being first duly sworn, deposes and says: that he is the attorney for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda, wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 28th day of October, 1947.

[Seal] DORIS ANDERSON,
Notary Public in and for the County of
Alameda, State of California.

[Endorsed]: Filed Oct. 29, 1947.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED
COMPLAINT

Comes now defendant United States of America, and answering plaintiff's First Amended Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations contained in Paragraphs V, VII, the portion of IV beginning with the words "that defendant," Line 11, page 2, to and including the word "enumerated." Line 27, page 2, and the portion of Paragraph VI, beginning with the word "that," Line 8, page 3, to and including the word "services," Line 16, page 3; and denies that plaintiff has been damaged in the sum of \$90,000.00, or any part thereof, or in any sum or amount or at all.

II.

Alleges that it is without sufficient information to enable it to form a belief as to the truth of the allegations contained in the portion of Paragraph VI beginning with the word "That", Line 6, page 3, to and including the word "month;", Line 8, page 3, and, therefore, and basing its denial upon said ground, denies said allegations.

III.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence there-

to, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto; and alleges that said plaintiff failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, and carelessly and negligently rode and continued to ride in the automobile referred to in the Complaint while the same was being operated in a careless and negligent and reckless manner, with the knowledge and consent of said plaintiff, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

V.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that at the time and place referred to in the Complaint the plaintiff herein and one John F. Moore were engaged upon a joint venture in the operation of the automobile referred to in the Amended Complaint and that the said automobile was upon the occasion referred to in the Amended Complaint being jointly operated by said John F. Moore and the plaintiff herein; that by reason of said joint venture and the said joint operation of said automobile the carelessness or negligence of said John F. Moore in driving and operating said automobile, if any there were, is

imputed to the plaintiff herein by law, and, therefore, the injuries and damages sustained by him, if any, were due to and caused by his own carelessness and negligence in the operation of said automobile.

Wherefore, said defendant prays that plaintiff take nothing by his First Amended Complaint herein, and that said defendant be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,

Attorneys for Defendant
United States of America

[Endorsed]: Filed April 15, 1948.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

To the Plaintiff above named, and to Messrs. Hildebrand, Bills & McLeod, and Sheridan Downey, Jr., his Attorneys:

Under the provisions of Rule 36 of the Federal Rules of Civil Procedure as Amended, the above named defendant requests the plaintiff to make written admissions of the truth of the statements

facts set forth below, within eleven (11) days after the service of this request upon plaintiff's attorneys of record.

The statements of fact, the truth of which plaintiff is requested to admit are as follows:

Statement No. 1

On December 22, 1946 one John F. Moore was an enlisted man, to-wit, a Chief Pharmacist's Mate in the United [14] States Navy, and was stationed on the Island of Guam, attached to Fifth Service Depot, on duty at Eighth Ammunition Company.

Statement No. 2

On the afternoon of December 22, 1946 John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot to turn in his daily report. Before doing so he met the plaintiff, Elmer R. Johnson, and asked plaintiff if he would like to come with him. He told the plaintiff that he would take plaintiff to plaintiff's quarters at the Navy Air Base, Agana, and the plaintiff agreed to accompany Mr. Moore.

Statement No. 3

After the conversation referred to in Statement No. 2 plaintiff Elmer R. Johnson and John F. Moore went into the Club rooms at the Ground Ammunition Depot where they met Seaman 1st Cl. Raymond J. Beaulieu, Seaman 1st Cl. Homer L. Taylor, and Seaman 2nd Cl. William L. Barger. All engaged in conversation and several of the group consumed some beer.

Statement No. 4

During the conversation referred to in Statement No. 3, mention was made of the fact that plaintiff was a barber and the sailors asked plaintiff if he would cut their hair. Plaintiff said that he would if they would come to his quarters at the Naval Air Base.

Statement No. 5

Plaintiff and the seamen asked John F. Moore if he would take them to plaintiff's quarters so that plaintiff might cut the seamen's hair. Mr. Moore agreed to do so.

Statement No. 6

Thereafter, on said December 22, 1946, plaintiff John F. Moore and the three seamen referred to in Statement No. 3 proceeded in a reconverted ambulance belonging to the United States, with Moore driving the same, from the Ground Ammunition Depot to plaintiff's quarters at the Naval Air Base, where they alighted from the vehicle and plaintiff took the seamen to his quarters and cut their hair. Thereafter they all ate dinner.

Statement No. 7

After eating dinner at the Naval Air Base, the seamen asked John F. Moore to take them back to their quarters at the Ground Ammunition Depot, which he agreed to do.

Statement No. 8

While enroute to the Ground Ammunition Depot, Seaman 1st Cl. Homer L. Taylor asked John F.

Moore to drive to the Island Command Brig in order that Taylor might collect some money from one of the sentries at the Brig. Moore then drove the vehicle, in which plaintiff and the three seamen were riding, to the Brig for this purpose.

Statement No. 9

After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. Enroute the vehicle in which they were riding overturned.

Statement No. 10

At the time the vehicle overturned, John F. Moore had not yet turned in his daily report at the Fifth Service Depot Dispensary.

Dated: This 26th day of May, 1948.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney.

Attorneys for defendant,
United States of America.

[Endorsed]: Filed May 26, 1948.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSION
OF FACTS

To the defendant's request for admission of facts,
plaintiff makes the following answer:

Statement No. 1: Admits the facts.

Statement No. 2: Admits the facts.

Statement No. 3: Admits the facts.

Statement No. 4: Denies the facts.

Statement No. 5: Denies the facts.

Statement No. 6: Denies the facts.

Statement No. 7: Admits the facts.

Statement No. 8: Admits the facts.

Statement No. 9: Admits the facts.

Statement No. 10: Admits the facts.

Attorney for Plaintiff.

State of California

County of Alameda—ss.

Sheridan Downey, Jr. being first duly sworn deposes and says: That he is the attorney for plaintiff in the above entitled action; that he has read the foregoing Answer to Request for Admission of Facts and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to those matters that he believes it to be true; that plaintiff is absent from the county of Alameda wherein affiant maintains his offices and that affiant

therefore makes this verification on behalf of plaintiff.

/s/ SHERIDAN DOWNEY, JR.

Subscribed and sworn to before me this 16th day of June, 1948.

[Seal] /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda,
State of California.

State of California,
County of Alameda—ss.

Zilpha Lambert, being first duly sworn, deposes and says: That she is employed by Hildebrand, Bills & McLeod attorney for plaintiff in the foregoing action; that her business address is 1212 Broadway, Oakland, Alameda County, California; that she is a citizen of the United States over the age of eighteen and a resident of the County of Alameda, the county wherein the mailing referred to herein occurred; that she is not a party to the cause and that on June 17th, 1948 she enclosed a true copy of Answer to Request For Admission of Facts in a secure envelope addressed as follows:

FRANK J. HENNESSY,
United States Attorney,
422 Post Office Building,
San Francisco 1, California.

that she securely sealed the same and deposited it, postage fully prepaid, in the United States Post

Office at Oakland, California; that there is regular daily communication by mail between Oakland, California, and San Francisco, California.

/s/ ZILPHA LAMBERT

Subscribed and sworn to before me this 17th day of June, 1948.

[Seal] /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed June 18, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF FACTS AND LAW RE-
LATING TO PRETRIAL CONFERENCE

The Law of Guam

We have been unable to locate any reports of decisions of the Guam Courts and it appears that the law itself is contained entirely in the Codes of Guam which were promulgated and made effective in the year 1947 just prior to the accident to plaintiff.

The applicable provisions of this Code are as follows:

1. Under the heading Civil Code, page 1 it is stated in section 5 that "The provisions of this Code, so far as they are substantially the same as existing law, must be construed as continuations thereof, and not as new enactments."

2. At page 118 of the Civil Code, Section 1714, it is stated:

“Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.”

3. At page 156, Section 2330 it is stated:

“An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account accrue to the principal.”

4. At page 156, Section 2338 it is stated:

“Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.”

5. At page 225, Section 3281, it is stated:

“Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”

6. At page 228, Section 3333, it is stated:

“For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

7. In the Code of Civil Regulations at page 56, Section 10, Subsection (d), paragraph 1, it states:

“(d) Reckless driving and speed. —(1) Every person driving any vehicle or animal upon any highway shall drive in a careful manner and with due regard for the safety and convenience of pedestrians and all traffic upon such highway.”

Also in paragraph 2 it states:

“(2) Every person driving a motor vehicle on any highway shall run it at a rate of speed at no time greater than is reasonable and proper under all circumstances, having regard to traffic and the use of the way and the safety of the public.”

Also in paragraph 4 it states:

“(4) The lawful speed of trucks of more than 11½ ton capacity is 15 miles on open roads; 10 miles over wooden-decked bridges, and 10 miles in towns where other traffic speed is 15 miles.”

A close search of the entire Code reveals that Guam has not enacted any “Guest” law which would in any way bar plaintiff from a recovery in this action. It is reasonable to conclude, therefore, that as to the involved questions of whether the petty officer was acting in the line of duty we

should consult the Federal Authorities which have previously considered the responsibility of a principal or master for the acts of his servant or employee. Obviously these decisions have necessarily been based upon the laws of the various states and as such they constitute the Federal Common Law unless the law of the particular state contains some special statutory provision regulating the liability of principal for the acts of agent.

The Law Relating to Liability of Principal
For Acts of His Agents

A survey of the opinions of the Federal Courts of this land would seem to establish that while a master is not responsible for the negligent acts of his servant, where the servant is not acting for the benefit of the master or within the scope of his employment, still these decisions make it very clear that a mere incidental detour from the general work of the master is not sufficient to relieve him of responsibility. Likewise the opinions universally established that the fact that the servant commits a negligent act during the course of disobedience to his master's orders, does not necessarily relieve the master of responsibility.

In the case of *Thomas v. Slavens*, 78 Fed. 2d, 144, the Eighth Circuit Court of Appeals considered a case in which a pedestrian was struck by a truck. The sole question was whether the servant driving the truck was acting within the scope of his employment sufficiently so as to attach a liability to the master. The court stated:

“The act of the servant, done to effect some independent purpose of his own, wholly disconnected with his employment, temporarily suspends the relation of master and servant, and the master is not liable for his acts during such time; but to relieve the master from liability of his servant’s acts, on the ground that he has deviated from the scope of his employment, the deviation must be so substantial as to constitute an entire departure from such employment for purposes entirely personal to the servant; and, where the servant notwithstanding the deviation, is still to some extent engaged in the master’s business within the scope of his employment, it is immaterial that he may also have combined with this some private purposes of his own.

“Whether there has been a deviation from the scope of the servant’s employment so material or substantial as to constitute a departure therefrom is usually a question of fact to be decided by the jury. Of course, the deviation might be so marked or so slight as to warrant the court to concluding as a matter of law that the act was or was not a departure; but, where the deviation is uncertain in extent and degree, or where the surrounding facts and circumstances leave room for legitimate inferences as to whether or not, notwithstanding the deviation, the servant may still be engaged in the master’s business within the scope of his general employment, then the question is a jury one, and each case must be determined with a view to its surrounding facts and circumstances.”

In the case of *Babcock v. Tam*, 156 Fed 2d, 116, the Ninth Circuit Court of Appeals rendered a decision which was concerned in part with the question of a master's responsibility for the act of his servant committed at a time when the servant was transporting a guest entirely without authorization from his master. The court stated:

“Under the rules of agency, it is said that a master is liable for the acts of his agent while he is acting within the scope of his employment and that a mere incidental detour from his regular business in such employment will not reduce that liability for accidents which may occur during such a detour. See *R. J. Reynolds Tobacco Co. v. Newby*, 9 Cir. 1944, 145 F. 2d 768; *Edwards v. Earnes*, 1922, 208 Ala. 539, 94 So. 598; *Waack v. Maxwell Hardware Co.*, 1930, 210 Cal. 636, 292 P. 966; Rest. Agency §§ 229 (i), 234. By way of analogy we agree that Tam was not acting as agent for the community, but rather that he was acting in the course of his separate business in appreciation for aid already rendered. Any mere detour which he may have made was properly found to be insufficient to take him outside the scope of his separate business.”

In the case of *U. S. Corp. vs. Petterson Corp.*, 142 Fed. 2d, 197, the Second Circuit Court of Appeals considered a case in which a master was held responsible for a fire caused by the negligent disposal of a cigarette by the master's employee. The court said:

“What the ‘scope of employment’ of such workmen as the stevedores really is has long been a vexed question. In spite of a conflict in the authorities we think that the better reasoned decisions hold the master liable for acts of his servant, whether in excess of authority or contrary to instructions, where the acts are performed in the course of his employment and the master knows or should know that such acts are likely to be performed and that damage to others is likely to happen as a result. Liability was imposed on employers for damage caused by employees through smoking under circumstances where there was likelihood of resulting damage in *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp.*, 10 Cir. 49 F. 2d 146; *Wood v. Suanders*, 228 App. Div. 69, 238 N.Y.S. 571; *Jefferson v. Derbyshire Farmers Ltd.* (1921) 2 K.B. 281, and *Palmer v. Keene Forestry Association*, 80 N.H. 68, 112 A. 798, 13 A.L.R. 995. See *Restatement Torts*, § 317; also compare *Adams v. Southern Bell Telephone & Telegraph Co.*, 4 Cir., 295 F. 586.

“It is plain that workmen like the stevedores here are likely to smoke unless restrained and that cigarette smoking and the dropping of cigarette ashes in scrap fallen from a pile of cork loaded on a barge were likely to set fire to the cargo and damage the barge. The conclusion reached by the District Court was founded on inferences reasonably derived from the evidence and seems fully justified.”

In the case of *Schweinhaut v. Flaherty*, 49 Fed. 2d, 533, the Court of Appeals of the District of Columbia considered a case in which a third party was injured by a taxicab while the driver of the cab was engaged in transporting a friend without charge. In this case a judgment for plaintiff was affirmed. The decision is a rather lengthy one and establishes that even though the errand upon which the taxicab was bound at the time of the accident was totally unauthorized and in violation of the master's orders that, nevertheless, the third party was entitled to recover. The Court emphasizes that the master, by providing the servant with a vehicle is responsible for the accident and he actually creates the liability notwithstanding the fact that such liability would not have occurred except for the servant's disobedience to his master's rules. It is also pointed out that the master should be held to very strict responsibility in cases involving motor vehicles because of the fact that such vehicles are potentially dangerous instrumentalities.

The Court distinguishes the use of an automobile by a servant on behalf of a master where such use is an isolated occurrence from the situation where a servant's regular duties include the operation of a motor vehicle.

The Facts

Plaintiff sincerely believes that the facts will show that the operator of the Navy vehicle in question was a regular operator of such vehicle;

that his duties generally required him to travel over almost all of the Naval reservation on Guam; that he frequently had given rides to Naval and civilian employees for reasons not strictly within the scope of his employment; that the master was well aware of this habit and that the master not only permitted this to be done by this particular petty officer but generally permitted it when done by operators of almost all of the Naval vehicles on Guam; that at the time of the accident in question the petty officer had not as yet turned in his daily report and that regardless of any incidental errands, the general course of his vehicle was directed to the fulfillment of that duty; that during the course of the trip which plaintiff took with the petty officer the vehicle upon more than one occasion passed through regular Naval guards or sentries and that no criticism of the carriage of plaintiff was made by such guards or sentries; that plaintiff's sleeping barracks were separated by considerable distance from the place provided by defendant for plaintiff to eat his meals; that it was an incidental obligation of defendant's to transport plaintiff from the one place to the other; that the sole reason for plaintiff getting into the vehicle was for the purpose of going from his sleeping quarters to the restaurant; that while this trip was ordinarily made in a truck provided by the Navy, it was common practice for the Navy to transport civilian employees in any vehicle available.

Conclusion

It appears that the facts are fairly well in agreement and that it remains for the Court to decide simply whether the agent of the government was acting in the course of his duties at the time of the accident sufficiently to impose liability upon the government. We believe that such agency was present and that plaintiff should be awarded reasonable compensation for his very serious injuries.

Respectfully submitted,

/s/ SHERIDAN DOWNEY, JR.

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 6, 1948.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

In response to the Court's request for written argument in the above case, plaintiff desires to call the court's attention to the following facts:

Facts

It seems perfectly clear from the testimony of plaintiff that at the time of the accident in question the vehicle was en route to the Fifth Service Dispensary so that a regular Navy medical report could be turned in. All the evidence points to the fact that the only deviation from the regular course followed was that the vehicle had stopped for a few

minutes at the Island Command Brig to permit a message to be delivered by another sailor. The vehicle was proceeding from the regular eating place of the driver of the vehicle following a regular meal eaten by the driver of the vehicle.

The earlier movements of the vehicle seemed remote so far as being any cause of the accident.

While plaintiff has admitted the various statements of fact submitted by the Government except in one or two particulars, plaintiff wishes to call the Court's attention to the fact that such statements are very brief in character and do not give any coherent continuous picture of the activities followed by the Government employee on that afternoon.

The Law

Plaintiff relies on the earlier memorandum of authorities submitted to this Court with the additional citation of *Campbell v. United States*, 75 Fed. Supp. 181. After an exhaustive research of the authorities, this is the only decision yet printed which bears in any way on the meaning of "acting in line of duty" yet handed down by the Federal Courts of this country.

This was a decision by a District Court in the State of Louisiana holding that an unknown sailor who ran into an elderly woman on a station platform while hurrying to catch his train was acting in the line of duty sufficiently to make the Government liable under the Act.

It would seem that our present case is far stronger

than the Louisiana case inasmuch as it is elementary that a mere incidental detour to eat a meal does not ordinarily relieve the employer of responsibility where the employee is driving an employer's vehicle with wide latitude as to specific movements of such vehicle.

The Court should further note that in the present case all of the activities occurred on the United States Naval base and if the employer in any way disapproved of the action of its employee, such employer was certainly in a position to enforce a different course of conduct. If the employer had made any rule forbidding the carrying of passengers in such type vehicles, the Government failed to bring out this fact at the time of the trial.

Conclusion

It is apparent that the servant was acting in the regular course of his duties and plaintiff relies on the servant's own statement that he simply lost control of his vehicle so far as proof of negligence is concerned. It would seem that negligence must be inferred in such circumstances. The Court has available a large amount of medical reports indicating that over the course of the past twenty-two months the plaintiff has endured numerous operations and certainly must have suffered severe and long continued pain and agony. It likewise seems clear that plaintiff will have a substantial amount of permanent disability in his injured leg which will affect his earning power.

The evidence shows that the plaintiff was fifty-

two years of age, and aside from his extra work as a barber, was earning approximately \$400.00 per month. We take it that it would be fair to assume that the plaintiff's average earnings over the past twenty-two months after deduction of taxes would amount to approximately \$7,500. If we assume that plaintiff had continued reasonably active working until the age of sixty-five, or another period of thirteen years, we believe it is fair that the Court should add a loss of future earnings in the sum of approximately \$20,000. We arrive at this figure by assuming the earning disability to be approximately 50% or \$2,000 per year, which would equal over the course of thirteen years the sum of \$26,000. Calculating such sum with the reasonable earning power of money at about 3%, we then have a present value of approximately the aforementioned \$20,000.

Any award for pain and suffering rests, of course, within the Court's own discretion, but we feel that \$10,000 is certainly a reasonable compensation for such loss. Plaintiff therefore earnestly requests the Court to award to the plaintiff the following sums:

1. Loss of earnings to date \$7,500;
2. Loss of future earnings, \$20,000;
3. Pain and suffering, \$10,000; total \$37,500.

Respectfully submitted,

/s/ SHERIDAN DOWNEY, JR.,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Zilpha Lambert, being first duly sworn, deposes and says: That she is employed by Sheridan Downey, Jr., attorney for plaintiff in the foregoing action; that her business address is 1212 Broadway, Oakland, Alameda County, California; that she is a citizen of the United States over the age of eighteen years and a resident of the County of Alameda, the county wherein the mailing referred to herein occurred; that she is not a party to the cause and that on November 10, 1948, she enclosed a true copy of Trial Memorandum in a secure envelope addressed as follows:

FRANK J. HENNESSY
United States Attorney
422 Post Office Building
San Francisco 1, California
Attention Mr. Deasy

that she securely sealed the same and deposited it, postage fully prepaid, in the United States Post Office at Oakland, California; that there is regular daily communication by mail between Oakland, California, and San Francisco, California.

/s/ ZILPHA LAMBERT.

Subscribed and sworn to before me this 10th day of November, 1948.

[Seal] /s/ AGNES B. THOMPSON,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

I.

The Government Employee Was Not Acting in Line of Duty

The evidence before the court in this case consists of the testimony of the plaintiff, the statement of John F. Moore, and statements of fact admitted to be true by the plaintiff under Rule 36.

The evidence establishes that Moore, the government employee, was an enlisted man in the United States Army; that on the afternoon of December 22, 1946, Moore's duties required him to proceed from the Ground Ammunition Depot on Guam to the Dispensary at the Fifth Service Depot in order to turn in his daily report; that before leaving the Ammunition Depot, he met the plaintiff and asked plaintiff if he would like to go for a ride with him; plaintiff and Moore then went into the clubrooms at the Ammunition Depot, and met several navy enlisted men; they all listened to a football game; Moore did not remain with the others all the time. Plaintiff and the sailors decided to proceed to plaintiff's quarters at the Naval Air Base on Guam in order that plaintiff might cut their hair; they asked Moore to drive them to the air base, which he did. Plaintiff cut the sailors' hair; Moore did not stay with them while this was being done. When the barbering was completed, plaintiff and the three sailors agreed to go to plaintiff's eating place, which was about one and one-half miles distant from his

quarters. They asked Moore to drive them there, which he did; they all ate together; Moore then mentioned that he had to turn in his daily report. The sailors asked Moore to first drive them back to their quarters at the Ground Ammunition Depot. Moore, plaintiff and the sailors got in the vehicle, and started out for the Ammunition Depot. One of the sailors asked Moore to proceed to the Island Command Brig in order that the sailor might transact some private business there. Moore drove to the Brig, where all parties remained for about five minutes. They then resumed the trip to the Ammunition Depot. En route, the vehicle overturned, and the plaintiff was injured. This happened on a Sunday.

What does this evidence establish? That Moore was operating the vehicle while "acting in line of duty"? We think not. It establishes on the contrary that he was using the vehicle for every purpose that came to his or the other persons' minds except the purpose for which he was required by his duties to use it. In his statement and at the trial of this case, it was stipulated by the plaintiff that if called as a witness by the government, he would testify in accordance with the matters set forth in the statement, he says: "I was going to go to the Dispensary at the Fifth Service Command to take in my daily report." It then occurred to him to take the plaintiff to another place on Guam. Before setting out for either place, the two of them met three sailors who wanted their hair cut by the plaintiff. In order to allow plaintiff to transact

this business, they asked Moore to take them all to plaintiff's quarters. He did so, this being a departure from his line of duty. After this business, they wished to go some place one and one-half miles away in order to eat dinner. Moore took them there. This was Moore's second departure from his line of duty. He then remembered that he had to turn in his report, and mentioned this to the others. They decided that he should drive the sailors to the Ground Ammunition Depot, (the place from which he had originally started). They set out on this trip, Moore thus again departing from the line of duty. En route, one of the sailors thought of some place else to go—the Island Command Brig. They proceeded there, Moore again departing from the line of duty. After stopping at the Brig, they proceeded towards the Ground Ammunition Depot, where the sailors had their quarters,—not the place where Moore was to turn in his report, but the place from which he had originally set out in order to drive to the Fifth Service Depot to turn in the report. En route the accident occurred. Had there been no accident, Moore would have arrived at the place from which he started before he met the plaintiff that day. At the time of the accident, which occurred en route towards the Ammunition Depot, Moore's duties required that he should have been proceeding from the Ammunition Depot towards the Fifth Service Depot Dispensary.

There is no analogy between the facts in this case and those in the case cited in plaintiff's Trial Mem-

orandum, *Campbell vs. U. S.*, 75 Fed. Supp. 181. In that case, which is a decision of a District Court in Louisiana, and is now under appeal, the plaintiff was run into and knocked down by a sailor who was one of a group running to reboard a train after being allowed a short period of recreation. The group was under command of an officer, proceeding under orders by train from one naval depot to another, and the sailor's duty was to be aboard the train when it left the station. In order to catch the train, he was running along the platform. In attempting to catch the train, he was not departing from the line of duty as was Moore in the case at bar. We do not agree with the District Court's conclusion in the cited case, but concede that there is a great deal more to be said in support of it than there is to be said in support of the plaintiff's contention in the case at bar.

II.

There Is No Evidence That Moore Was Guilty of Any Wrongful or Negligent Act or Omission

Very little appears from the evidence concerning the cause of the accident. From the admitted facts, it appears that the vehicle overturned while in motion.

From the testimony of the plaintiff, it appears that the vehicle was proceeding along a "black top" road. He testified: "We were starting down a long hill. The car began to shimmy. I don't remember what happened after that."

Moore's testimony, as embodied in his statement, is as follows:

“We * * * started back to the Naval Ammunition Depot. We had not gone very far when the truck seemed to slide. I tried to keep control but could not. I do not remember what happened after that.”

Aside from the foregoing, there is absolutely no evidence as to the accident.

Even this evidence gives no hint as to what caused the accident.

“The car began to shimmy”—“The car seemed to slide.” This testimony does not point to any negligence on the part of the driver.

When the car started to “shimmy” or “slide,” what did Moore do to prevent an accident? He says: “I tried to keep control but could not.” Is that negligence?

We respectfully submit that the evidence in this case will not support a finding of negligence on the part of Moore.

III.

Damages

The plaintiff testified that he is fifty-one years of age; that he has during his life worked at various occupations. He has been a rough painter; he has been a hardwood floor mechanic; he has been a truck driver. Before going to Guam, he worked as a rough painter. That was his occupation on Guam, although he had some additional income from barbering. He is not a licensed barber. He worked about three weeks on Guam before he was injured. He estimates his salary from the Navy at

about \$400.00 per month, and at \$12 to \$15 per day from barbering. There should be considered the special circumstances surrounding his employment at the time of the accident. His salary from the Navy was based upon overseas employment, necessarily higher than he would have received on the mainland. His income from barbering he could obtain only at such a place as Guam. His inability to obtain a license in California would have cut it off completely upon his return home.

IV.

Conclusion

It is respectfully urged that the evidence in this case establishes that the government employee, John F. Moore, was not acting in the line of duty at the time of the accident; that the plaintiff has not shown by a preponderance of the evidence that John F. Moore was guilty of any negligent or wrongful act or omission in the operation of the automobile which proximately caused the accident, and that the evidence shows that plaintiff's injuries were caused by an unavoidable accident. It is submitted that the defendant is entitled to judgment in its favor.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 10, 1948.

[Title of District Court and Cause.]

ORDER

This matter having been tried, argued, briefed and submitted for decision and the same having been fully considered,

It Is Ordered that judgment be and the same hereby is entered in favor of plaintiff in the amount of \$12,500, Findings of Fact and Conclusions of Law to be prepared accordingly.

Dated: January 21, 1949.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed Jan. 21, 1949.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly to be heard before the above-named Court, United States District Judge George B. Harris presiding, and said action proceeded to trial on the 4th day of November, 1948; plaintiff appeared in person and by his attorney, Sheridan Downey, Jr., and the defendant United States of America appeared by Daniel C. Deasy, Assistant United States Attorney; evidence both oral and documentary was intro-

duced on behalf of the plaintiff in support of the several allegations of his complaint and on behalf of the defendant in support of the several allegations of its answer; thereafter said cause was argued orally and written memoranda on behalf of the parties were submitted to the Court and said cause was then duly submitted to the Court for decision;

The Court having considered all the evidence in the case, the arguments of counsel, the written memoranda filed by the parties herein, and being fully advised in the premises, now makes the following

Findings of Fact

I.

The allegations of plaintiff's first amended complaint for damages contained in paragraphs I, II and III thereof are true.

II.

It is true that on the 22nd day of December, 1946, plaintiff was employed by the United States as a civilian employee of the Navy Department and that said plaintiff was residing in certain barracks provided by the defendant for its civilian employees upon the Island of Guam; that the said 22nd day of December, 1946, was a Sunday and the plaintiff was not engaged on that day within the scope of his employment by the defendant.

III.

It is true that on the 22nd day of December, 1946, at about the hour of 5:30 o'clock p.m. of said day, plaintiff was riding in a certain Government-owned motor vehicle, to wit, a certain converted naval ambulance upon the Island of Guam, which was at that time and place being operated by one John F. Moore, a Chief Pharmacist Mate in the United States Navy; that it is not true that at said time and place the said John F. Moore was operating said motor vehicle in the line of duty; that it is true that the said John F. Moore was operating said motor vehicle on business outside his line of duty, to wit, for the convenience of himself, the plaintiff and certain other persons who were riding in the vehicle at said time and place.

IV.

It is not true that at said time and place said John F. Moore operated said motor vehicle in a careless, reckless or negligent manner; that it is not true that the plaintiff was injured as a proximate result of any careless, negligent or wilful act or omission on the part of said John F. Moore.

V.

It is true that the said motor vehicle overturned while the plaintiff was riding therein and that plaintiff sustained certain fractures of the right leg as a result of said overturning of said vehicle.

VI.

It is not true that plaintiff sustained any damages as a result of any careless, negligent or wrongful act or omission on the part of said John F. Moore.

VII.

It is true that the accident referred to in plaintiff's complaint herein and the injuries which he sustained as a result of the overturning of said motor vehicle were due to and caused by an unavoidable accident.

From the foregoing facts the Court makes the following

Conclusions of Law

I.

That the naval employee, John F. Moore, was not acting in the line of duty within the meaning of the Federal Tort Claims Act (T. 28 USCA, Section 971);

II.

That the said naval employee was not guilty of any carelessness or negligence and that the injuries sustained by the plaintiff were not due to or caused by, and did not result from, any careless, negligent or wrongful act or omission on the part of said naval employee;

III.

That the defendant herein is entitled to judgment

against the plaintiff for its costs of suit incurred herein.

Let judgment be entered accordingly.

Done in open Court this day of March, 1949.

.....,

Judge of the Above-Entitled
Court.

Lodged March 4, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on duly and regularly to be heard before the Honorable George B. Harris, Judge, and said action was thereafter and on the 5th day of November, 1948, duly and regularly tried.

Plaintiff appeared in person and by his attorney, Sheridan Downey, Jr.; the defendant United States of America appeared by its attorneys Frank J. Hennessy and Daniel C. Deasy.

On said trial both oral and documentary evidence was introduced on behalf of the parties, thereafter said cause was argued orally and written statements on behalf of the parties were submitted to the Court and was then duly submitted to the Court for decision.

The Court having considered all of the testimony,

the arguments of counsel, the written statements of the parties and all of the evidence, and being fully advised in the premises now makes the following:

Findings of Fact

I.

That the allegations of plaintiff's first amended complaint for damages, paragraphs I, II, and III are true.

II.

As to paragraph IV of plaintiff's complaint the Court finds that on the 22nd day of December, 1946, at or about the hour of 5:30 o'clock p.m. thereof, the plaintiff was accompanying a certain Naval employee, to wit, John F. Moore, a chief pharmacist's mate, in a certain converted Naval ambulance en route from a certain place in the town of Agana on the Island of Guam to the Fifth Service Dispensary Depot; that said Naval employee was going to the Fifth Service Dispensary Depot for the purpose of turning in his daily report; that during the said ride the said John F. Moore so carelessly operated the said vehicle so as to cause the same to turn over and to cause certain injuries to plaintiff.

III.

As to paragraph V of plaintiff's complaint the Court finds that the plaintiff sustained certain fractures of the right leg and that as a result of said fractures and the subsequent prolonged treatment the knee joint will remain permanently stiffened to a substantial degree.

IV.

As to paragraph VI of plaintiff's complaint the Court finds that at the time of the accident plaintiff was a well and able-bodied man and earning a regular income as a painter and barber; that since the happening of the accident plaintiff has been unable to perform any gainful work and will be to some extent handicapped from performing such work in the future.

V.

As to paragraph VII of plaintiff's complaint the Court finds that the plaintiff has been damaged in the sum of \$12,500.00.

From the foregoing facts the Court makes the following

Conclusions of Law

(1) That the Naval employee, John F. Moore, was acting in the line of duty within the meaning of the Federal Tort Claims Act, title 28, Section 971, U.S.C.A.

(2) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff.

(3) That plaintiff is thereby entitled to Judgment against the United States of America in the sum of \$12,500.00, and each party is to bear his own costs of suit.

Let judgment be entered accordingly.

Done in open Court this 11th day of March,
1949.

/s/ GEORGE B. HARRIS,
Judge of the Above-Entitled
Court.

Approved as to form:

/s/ DANIEL C. DEASY.

[Endorsed]: Filed March 11, 1949.

In the District Court of the United States for the
Northern District of California,
Southern Division

No. 27594-H

ELMER R. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on the 5th day of November, 1948, before the above-entitled Court, the Court sitting without a jury, and said action was thereafter and on the 5th day of November, 1948, duly and regularly so tried, and was thereupon submitted.

On said trial plaintiff appeared in person and by his attorney, and defendant, United States of America, appeared by its attorneys.

There the Court rendered, made and filed herein its findings of fact and conclusions of law and ordered that plaintiff have judgment against defendant for the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars.

Wherefore, by reason of the premises it is Ordered, Adjudged and Decreed that plaintiff do have and recover of and from United States of America, defendant, the sum of Twelve Thousand, Five Hundred (\$12,500.00) Dollars.

Done in open Court this 16th day of March, 1949.

/s/ GEORGE B. HARRIS,
Judge of the U. S. District
Court.

Approved as to form as provided in Rule 5 (d).

/s/ FRANK J. HENNESSY,
/s/ DANIEL C. DEASY,
Attorneys for Defendant.

Entered in Civil Docket March 17, 1949.

[Endorsed]: Filed March 16, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the defendant United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered by the United States District Court for the Northern District of California in favor of the plaintiff and against said defendant, on March 17, 1949.

Dated: March 18, 1949.

/s/ FRANK J. HENNESSY,
By /s/ DANIEL C. DEASY,
U. S. Attorney,
/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed March 18, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the appellant herein may have to and including May 28, 1949, to file the Record on Appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: April 19th, 1949.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed April 19, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE DEFENDANT INTENDS TO RELY ON APPEAL

Defendant hereby designates the points on which defendant intends to rely on the appeal of said cause to the United States Court of Appeals for the Ninth Circuit, this designation to be filed with the transcript of record:

1. The District Court erred in denying defendant's motion for judgment in favor of the defendant.

2. The District Court erred in making the following findings of fact:

(a) That John F. Moore was acting in line of

duty at the time the automobile he was driving overturned.

(b) That John F. Moore at said time was operating said automobile carelessly.

(c) That said automobile overturned by reason of carelessness on the part of John F. Moore in the operation of said automobile.

(d) That plaintiff was injured as a result of carelessness on the part of John F. Moore.

(e) That plaintiff has been damaged in the sum of \$12,500.00.

3. The District Court erred in making the following conclusions of law:

(a) That the Naval employee, John F. Moore, was acting in the line of duty within the meaning of the Federal Tort Claims Act, Title 28, Section 971, U.S.C.A.

(b) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff.

(c) That plaintiff is thereby entitled to judgment against the United States of America in the sum of \$12,500.00.

4. The District Court's Findings of Fact and Conclusions of Law are not supported by the evidence.

5. The District Court erred in refusing to make the following Findings of Fact:

(a) That John F. Moore was not acting in the

line of duty at the time the automobile he was operating overturned.

(b) That John F. Moore was at that time operating the vehicle on business outside his line of duty, to wit: for the convenience of himself, the plaintiff and certain other persons who were riding in his vehicle at said time and place.

(c) That John F. Moore at said time was not operating the vehicle in a careless, reckless or negligent manner.

(d) That plaintiff was not injured as a proximate result of any careless, negligent or wilful act or omission on the part of said John F. Moore.

(e) That plaintiff did not sustain any damage as a result of any careless, negligent or wrongful act or omission on the part of said John F. Moore.

(f) That the accident referred to in plaintiff's complaint and the injuries which he sustained as a result of the overturning of said motor vehicle were due to and caused by an unavoidable accident.

6. The District Court erred in refusing to make the following Conclusions of Law:

(a) That the Naval employee, John F. Moore, was not acting in the line of duty within the meaning of the Federal Tort Claims Act (T. 28 U.S.C.A., Section 971).

(b) That the said Naval employee was not guilty of any carelessness or negligence and that the injuries sustained by the plaintiff were not due to or caused by, and did not result from any careless, negligent or wrongful act or omission on the part of said Naval employee.

(c) That the defendant is entitled to judgment against the plaintiff.

7. The judgment is void.

Dated: April 20th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: The Clerk of the above-entitled Court and to
Messrs. Hildebrand, Bills & McLeod, and
Sheridan Downey, Jr., Attorneys for Plaintiff:

The defendant, United States of America, by its
attorneys herein, hereby designates for inclusion
in the transcript of record upon appeal, the complete
record, and all the proceedings and evidence in
the action.

Dated: April 20th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this above-entitled case, and that they constitute the record on appeal herein, as designated by the appellant:

Complaint for Damages.

First Amended Complaint for Damages.

Answer to First Amended Complaint.

Request for Admission of Facts.

Answer to Request for Admission of Facts.

Memorandum of Fact and Law Relating to Pre-trial Conference.

Trial Memorandum (By Plaintiff).

Trial Memorandum (By Defendant).

Order (For Judgment).

Proposed Amendments to Proposed Findings of Fact and Conclusions of Law (Lodged 3/4/49).

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket.

Statement of Points on which the Defendant Intends to Rely on Appeal.

Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 6th day of May A. D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. Van Buren,
Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California

Nô. 27594

ELMER JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

November 5, 1948

Before: Hon. George B. Harris,
Judge.

Appearances:

For Plaintiff:

Sheridan Downey, Jr, Esq.

For the United States:

Daniel C. Deasy, Esq.,

Assistant U. S. Attorney.

PROCEEDINGS

(Following opening statement on behalf of plaintiff and reservation of opening statement by Mr. Deasy, the following proceedings were had:)

The Court: Is Mr. Johnson a resident of Alaska now?

Mr. Downey: No, he lives in Richmond. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

ELMER JOHNSON

called as a witness in his own behalf; sworn.

The Clerk: Will you state your name to the court?

A. Elmer Johnson.

Direct Examination

By Mr. Downey:

Q. Mr. Johnson, please just answer the questions now that I ask you, or that Mr. Deasy or his Honor ask you, and keep your voice up so that all of us can hear you; and remember when a question is being asked to wait until it is completed, because this gentleman has to write down everything that you say.

You are living where, Mr. Johnson?

A. My address is 1545 South 54 B 1 D, Richmond, California.

Q. What is your age?

A. 52 next birthday—May 16, 1897.

Q. Over your working life have you had any regular trade or occupation?

A. Well, sir, I have been a barber. I have been a hardwood floor mechanic—not in the trade, though, but I have been a barber and hardwood floor mechanic.

Q. Have you ever done any work involving just being at a desk on a white collar job, so to speak?

A. I did at one time down in Manila, Philippine Islands; but I am not qualified to work here in the United States, because it is a different type of work

(Testimony of Elmer Johnson.)

than what you have to do in the [2] Philippine Islands—much easier.

Q. What were you doing just before you went to Guam to work for the Government?

A. I was painting around Richmond.

Q. Painting? A. Yes, sir.

Q. You went over to Guam, or rather, arrived in Guam about when?

A. I arrived there the 7th of December, 1946.

Q. And the accident we are talking about here was on the 22nd, is that right? A. Yes, sir.

Q. Who employed you while you were working on Guam? A. The United States Navy.

Q. Your occupation was what?

A. A barber.

Q. Were you on a salary, Mr. Johnson?

A. Yes, sir.

Q. What was that, please?

A. A dollar seventy-two an hour.

Q. How much did it amount to a month, or a week, I should say?

A. A dollar seventy-two an hour and time and a half for anything over forty hours, and we were getting six days a week. I did have it figured up, but right now I can't say just exactly, but I think it was around four hundred or a little over, or around four [3] hundred a month, I believe. That is not the exact figure.

Q. What hours were you working, please?

A. I was working from eight o'clock in the

(Testimony of Elmer Johnson.)

morning until five in the evening, with an hour for lunch.

Q. And you did not work on Sundays?

A. No, sir.

Q. What about this barbering that you were doing over on Guam? How much of that had you done after getting to Guam?

A. I started just as soon as I started to work. Did you ask me how much I did?

Q. Yes, how much did you do at the time?

A. I usually made from twelve to fifteen each night.

Q. What did you charge for a haircut?

A. They gave me a dollar.

Q. Where did you do this haircutting work?

A. They fixed up a barber shop in the Navy airbase, where our quarters were.

Q. Were you living in some barracks, or what?

A. Yes, we were living in barracks right there at the Naval airbase.

Q. Were there all civilians living in these barracks, or Naval personnel?

A. It was mixed up—civilians and sailors.

Q. Where did you eat your meals?

A. We had to go about a mile and a half from there down to a [4] place where the sailors ate in Agana.

Q. In which direction were you from Agana?

A. North.

Q. You say about a mile and a half?

(Testimony of Elmer Johnson.)

A. Yes, I believe it was north. I am quite sure it was north, all right.

Q. I will have you come down to this map presently. Now, the accident happened on what day of the week, please?

A. It happened on Sunday, December 22nd.

Q. And so you were not working as a barber that day, is that correct?

A. Yes, sir.

Q. Let me ask you if you had previously been acquainted with John Moore, the chief pharmacist's mate who was involved in the accident.

A. No, I just knew him the day before.

Q. How did you happen to meet him the day before?

A. He came into the barber shop.

Q. Did you go anywhere outside the barber shop with him on that day before the accident?

A. No.

Q. On Sunday morning what did you do?

A. I barbered a little and he was over there at the Naval Airbase and asked me if I wanted to take a ride with him.

The Court: Whom do you mean by "he"? [5]

Q. (By Mr. Downey): Yes, who is he?

A. John Moore.

Q. What time would you say you first saw him, or that he first came in on that morning?

A. I think it was around 10:30 or 11:00 o'clock.

Q. Did he stay at the job any length of time in that particular period?

A. No, along, possibly, 30 minutes.

(Testimony of Elmer Johnson.)

Q. Then he, you say, asked you to go some place with him? A. Yes.

Q. Did you go? A. Yes, sir.

Q. Where did you go?

A. We went down to the Naval ammunition depot.

Q. About how far was that from where your barber shop was?

A. It seems to me like it was a mile and a half or something like that. I can't say for sure.

Q. Was that in the direction of Agana, or the opposite direction?

A. The opposite direction.

Q. And that would be farther north of your quarters? A. Yes.

Q. How did you go there?

A. We rode there. His ambulance had been converted—an old ammunition carrier, and it was converted into an ambulance. [6]

Q. When you got to the ammunition base what did you do?

A. We got about three other sailors there. Mr. Moore was going to go over and turn his——

Q. Just what you saw him do, please, Mr. Johnson. Don't tell us what you think he was going to do.

A. We just went down there and got these other sailors in the clubrooms.

Q. Did you go right to the clubrooms when you got to the ammunition depot?

(Testimony of Elmer Johnson.)

A. We went into another place, first, besides the clubroom, a regular living quarters. I believe they had some medical things in there, too.

Q. Did you observe him do anything with any medical thing? A. No.

Q. Then you met three sailors—in what building was it? A. It was a club room.

Q. Did you know these sailors?

A. No, I didn't.

Q. What did you do after you met the sailors?

A. Listened to a football game, sat there and talked.

Q. How long did you stay there?

A. I stayed there for about three-quarters of an hour.

Q. Did Moore stay there all the time?

A. No, he didn't; he left. He was not there all the time.

Q. You left them about what time of day, if you remember? [7]

A. I believe it was right around noon.

Q. Was Moore with you at the time you left?

A. Yes, he had come back and these fellows wanted me to cut all their hair. We agreed to go up to the barber shop and do the work.

Q. How did you go to your barber shop?

A. Mr. Moore took us up in the same conveyance.

Q. Then when you got back to your job what did you do?

(Testimony of Elmer Johnson.)

A. I proceeded to do this work and cut some other fellows' hair.

Q. Well, how many altogether?

A. I would say about six.

Q. Did you cut the hair of all three of these sailors who were with you? A. Yes, sir.

Q. About how long did that take you—I mean the entire six haircuts you referred to.

A. Well, I imagine it took me, I think, if I am not mistaken, I believe I was there about two and a half hours or three hours.

Q. During that time did Mr. Moore remain with you? A. No, sir, he left.

Q. How much of that time, of that two and a half or three hours was he there in the barber shop?

A. Well, possibly an hour or three-quarters of an hour.

Q. Do you know where he went when he left the shop? [8] A. No, I don't.

Q. Did he make any statement as to what he was leaving for?

A. I understood he was out on some of his duties.

Q. Well, did he make any statement—not what you understood, but just what he said, if you remember.

A. I can't swear as to that.

Q. All right, then, after you had finished with these approximately six haircuts what did you do?

A. Well, they were hungry and they wanted some place to eat, and I told them where I ate my

(Testimony of Elmer Johnson.)

meals, and they said, "Well, we will all go down there," and I think that is where we went.

Q. How did you go down?

A. We went down with Mr. Moore in his converted ambulance.

The Court: We will take a short recess, gentlemen.

(Recess.)

Q. (By Mr. Downey): Mr. Johnson, this place where you ate your meal that afternoon was located where?

A. That is located right near the town of Agana.

Q. With reference to the place you have spoken of where your barracks were, was that north or south?

A. That was north of the place where we ate—I mean our place where we slept, I believe, was north.

Q. North of Agana? A. Yes, sir.

Q. Did you eat in company with Mr. Moore and these sailors? [9] A. Yes, sir.

Q. Do you remember about how long you took to eat?

A. I think right around 35 minutes.

Q. Who operated this eating place, if you know? Was it a Navy eating place, or a private eating place?

A. It was a regular place where sailors ate, you know, like the sailors have.

Q. Were you paying for your meals there?

A. Yes, sir.

(Testimony of Elmer Johnson.)

Q. Did you pay cash, or did you have a meal ticket? A. Yes, cash.

Q. You took how long to eat?

A. About 40 minutes.

Q. Was there any drinking during that time?

A. No, sir, they don't have no liquor at all.

Q. Then what did you do?

A. Mr. Moore stated he would have to go back and turn in his reports where he was stationed, and that is when we started back, and there was one boy, a guard at the guardhouse, that owed him some money, and he said he would stop and see if he could get some money, and he did stop.

Q. Was that guardhouse on the way toward your quarters and this ammunition depot?

A. Yes.

Q. How long did you stop at the guardhouse?

A. About five minutes. [10]

Q. Where were you riding in the vehicle at this particular time?

A. I was always in the right-hand side in the front seat.

Q. How many of you were in the front seat.

A. Just two of us.

Q. And what other passengers were there besides you?

A. There were three other boys—sailors. I didn't know any of them.

Q. Where were you intending to get off the vehicle?

(Testimony of Elmer Johnson.)

A. I was intending to go back to the Naval Air-base where my quarters were.

Q. About how far was it to your quarters to the place where the accident happened?

A. It was a short distance from Agana where the accident happened and it was about a mile and a half from the quarters to Agana. So I would say around a mile and three-quarters or a mile and a half, or something like that, because it was just out of Agana.

Q. What kind of a surface did the road have?

A. It had a black top.

Q. Was it a hard-paved road, or just oil, or what?

A. If I remember right, I thought it was a black tar road, but it might have been oil; but it seemed to us sort of black tar.

Q. Was it a two-lane highway?

A. No, it was just a little old road in Agana, a narrow road going down the hill.

Q. Was there room for a vehicle to pass in the opposite [11] direction?

A. There might have been room for a vehicle to pass in the opposite direction.

Q. As best you remember, just tell his Honor what happened in connection with the accident.

The Court: Q. Was it a well-traveled road used by others in connection with routine business?

A. Yes.

Q. Was it asphalt or just a plain dirt road?

(Testimony of Elmer Johnson.)

A. I believe it was asphalt, just plain black top.
The Court: All right.

Q. (By Mr. Downey): Go ahead and tell what happened.

A. We were just starting down this long hill. It rains quite frequently over there, every ten minutes a shower will come, and the sun will come out, and then it will rain, and then the sun will come out. I think it was dry that day and the car began to shimmy and shake the front wheels, and the accident occurred right then and there. I can't remember. The whole side of my head was just a mass of blood, and I can't hear very well out of this ear yet.

Q. What happened?

A. Anyway, I don't know. My head hit, and that is the end.

The Court: The car started shimmying and you cannot remember what happened?

A. The car started shimmying and I cannot remember what happened. [12]

Mr. Downey: I believe the stipulations of fact cover the fact that the vehicle did turn over.

Q. What next do you remember?

A. The next I remember is, I heard them say in the hospital, "We will take this one. He is hurt the worst." Then they gave me the anesthetic.

Q. You don't know what time it was when you came to? A. No, I don't

Q. Then, after that, what do you remember?

A. What?

(Testimony of Elmer Johnson.)

Q. Then, after that, what do you remember after you heard them say these words about you being hurt the worst—what next do you remember?

A. The next thing, I woke and there were sailors on each side of the bed holding me in bed.

The Court: Holding you?

A. Yes, holding me in bed because you are going through the coming out period, and some cases are violent and some are not.

Q. (By Mr. Downey): Was that the same night, do you know?

A. It was dark. It was very dark, and I believe it was that same night.

Q. How long did you stay there in the hospital on Guam?

A. Well, I arrived back in Oak Knoll Hospital February 5. So I stayed in Guam from December 22nd until that time, excepting a week's stay in Honolulu at Aiea Naval Hospital. [13]

Q. Were you flown back here?

A. Yes, sir, by Naval Hospital plane.

Q. How long were you confined in the Oak Knoll Hospital?

A. You have all the records. I don't remember them exactly. I can't say for sure, but I think it was altogether around fourteen months. You have all the records there.

Q. What were your principal injuries?

A. My right leg had a compound fracture of the tibia and fibula. All of the muscles was taken off

(Testimony of Elmer Johnson.)

the back leg to the bone and one of the leaders was split in two, one of the cords.

Mr. Downey: The doctor will be here and we have the Naval doctor's reports; but you can be brief about this. Your right leg was broken?

A. My right leg was broken, a compound fracture; my ears deafened, and my right shoulder was cracked and bruised all over.

Q. Anything else you noticed besides these that you still notice? A. My side hurts me.

Q. Where?

A. On my right side, here, it hurts and pains very bad, the site of an old injury, and I have developed arthritis.

Mr. Downey: While he says he lost hearing, we had him examined by an ear specialist and he says he has some loss of hearing, but it was not from this injury.

The Witness: Yes, he said it might be from old age, and [14] those machines don't record perfectly.

Q. Are you a licensed barber? A. No.

Q. Have you ever been a licensed barber?

A. No.

Q. How did you happen to be a barber?

A. I tried to learn the barber trade up in Oregon and got discouraged and didn't stay with it.

Q. What have you done since getting out of the Oak Knoll Hospital?

A. I have done practically nothing. I tried to

(Testimony of Elmer Johnson.)

go to Alaska to see if I couldn't do something up there.

Q. What were you doing in Alaska?

A. I got some dishwashing jobs up there.

Q. How much have you earned altogether since the accident?

A. I don't know—not so much.

Q. Well, how much—\$5000, or \$100, or what?

The Court: You can make a tabulation during the recess and submit that.

Mr. Downey: I think that is all.

The Court: The plaintiff has no special or unique training in any craft or trade. He said he had done truck driving and he is a painter—a rough painter.

Q. Do you hold a union card as a painter?

A. No, sir. [15]

Q. How long has it been since you engaged in work as a painter?

A. In the shipyards I worked. Anybody could work as a rough painter.

Mr. Downey: I do want to ask another question. I want to have him point out these places on the map.

Q. Point out the town of Agana.

A. Yes, this is the town of Agana right there.

The Court: Circle it with a red pencil and mark it J-1.

(The witness does as requested.)

Q. (By Mr. Downey): Approximately where

(Testimony of Elmer Johnson.)

were the quarters or barracks that you refer to as the place where you slept and as being the Navy Airbase? A. Right there.

Mr. Downey: We will mark that as J-2.

Q. And the place where you met these sailors and where you referred to as being the ammunition depot? A. That is this place, here.

Q. That is where Mr. Moore took you when you met him first that day and where you encountered these other men? A. Yes.

Mr. Downey: We will mark that J-3. That is all.

Cross-Examination

By Mr. Deasy:

Q. The ammunition depot is J-3 and the Navy Airbase is J-2, and the town is J-1? A. Yes.

Q. Do you know, Mr. Johnson, where this place known as the guardhouse was located?

A. That was just out of Agana, between Agana and my quarters.

The Court: That was the only diversion, was it, on the return trip? A. Yes.

Q. (By Mr. Deasy): That is between J-1 and J-2? A. Yes.

The Court: How long was that stop?

A. About five minutes.

Q. Did he collect the money?

A. No, he didn't.

(Testimony of Elmer Johnson.)

Mr. Downey: May the map be marked as Plaintiff's Exhibit No. 1?

The Court: So ordered.

(Map of Guam was marked Plaintiff's Exhibit 1.)

Mr. Deasy: I don't think there are many questions I need ask Mr. Johnson.

The Court: When did you take up your trade as a barber?

A. No, sir, I tried.

Q. What happened?

A. The Master Barbers Association have it so that a man, to be a barber, has to become practically a physician. Some of them boys have been in there for sixteen or seventeen months and were expert barbers, and can't get in. [17]

The Court: What do you think you could do?

A. There is nothing, it seems like, I can do.

Q. There is something you can do?

A. I haven't found anything yet.

Q. Do you have a pessimistic view about your case?

A. No, but you can't help feeling pessimistic.

Q. Many people suffer injuries and carry on. Do you think there is any gainful occupation you could follow?

A. It seems like there is either a depression or a war. There are too many well men. I tried all the institutions and even tried to go back to Guam, but nothing doing.

(Testimony of Elmer Johnson.)

The Court: What about the civilian storekeepers, supply men, and barber?

A. You can't get by the doctors—even up in Alaska.

Q. What did you do up in Alaska?

A. The only thing I could do is wash dishes.

Q. Did you bring your family? A. No.

Q. How do you live?

A. We have been living on my wife, on what she did, and on what little I made.

Q. You must have some income.

A. Well, her wages.

Q. She has worked? A. Yes. [18]

Q. Upstate? A. Yes.

Q. What kind of work does she do?

A. She works at a bag factory in Oakland.

Q. How old are the children?

A. One 10 and one 4½.

Q. (By Mr. Deasy): Since your return from Guam you have been residing in Alameda County, or Contra Costa County? A. Richmond.

Q. Your family has been living there?

A. Yes, sir.

Q. Where did you live before you went to Guam? A. Lived right there.

Q. As I understand it, on the day the accident happened, when you first encountered Mr. Moore you were around at the airbase?

A. Yes, sir, at the airbase.

(Testimony of Elmer Johnson.)

Q. That is where your sleeping quarters were, is that right? A. Yes, sir.

Q. And he was a pharmacist's mate, and there was some kind of dispensary there where he worked, is that right? A. Yes, sir.

Q. Did he suggest that you come along with him for the ride, is that what it was?

A. Yes, sir.

Q. At that time did he tell you he had any business to transact [19] with the Navy?

A. I can't remember, sir, whether he told me that, or not.

Q. But he told you he had to go some place and asked you to come along for the ride?

A. Yes, sir.

Q. You were then in the place marked J-2, and you proceeded in the automobile with him to what place?

A. Well, to the Naval ammunition depot.

Q. That is up here at the place you marked J-3?

A. Yes.

Q. Prior to your going there you and Mr. Moore met these other three sailors?

A. We met them at the Naval ammunition depot.

Q. In other words, you and Moore were first at the ammunition depot, and that is where you met the sailors? A. Yes, sir.

Q. At that time it was suggested that they would like to have you cut their hair, and you told them if they would go back to your quarters, that is,

(Testimony of Elmer Johnson.)

back to the air base, that you would cut their hair, isn't that right? A. Yes, sir.

Q. And the three of them, and yourself, and Moore got in the ambulance and went back there, is that right? A. Yes, sir.

Q. Was it on that trip from the ammunition depot to the air base [20] that this boy said that he wanted to go and collect this money from the brig?

A. It was after I got through cutting their hair, I believe.

Q. In other words, you made the trip directly, then, without stopping off at the brig, down to your quarters from the ammunition depot to the airbase, and you cut their hair. A. Yes.

Q. And then you all had something to eat?

A. Yes, we had to take this trip to the mess hall about a mile and a half to eat.

Q. After eating, Moore suggested he take you back to your sleeping quarters?

A. Yes, sir, he did, to turn in his report.

Q. That was at the airbase, some place?

A. Yes, sir.

Mr. Downey: Just a moment, I object to that question. That is confusing. I don't know what Mr. Deasy means, that his sleeping quarters were at the airbase.

Mr. Deasy: What I meant was that he had to turn in the report at the airbase.

The Court: You might clarify that.

(Testimony of Elmer Johnson.)

The Witness: Yes, he had to turn in his report near where he was employed down near the ammunition depot. He is employed near the ammunition depot, I believe the 5th Service Depot. That is where he is stationed. [21]

Q. (By Mr. Deasy): Then you understood he had to go back towards the ammunition depot again? A. Yes, sir.

Q. Then you left this place where you had eaten and proceeded in the direction of the airbase, is that right? A. Yes, sir.

Q. Somewhere between those points they stopped at the brig to try and collect this money, is that right? A. Yes, that is the whole picture.

Q. After stopping at the brig he proceeded on towards the airbase? A. That's right.

Q. And the accident happened somewhere in there? A. Yes, sir.

Q. Is this eating place between the airbase and the town of Agana? In other words, is the place where you ate nearer to town than your sleeping quarters, or is it in the opposite direction?

A. It is right in the town.

Q. It is right in the town of Agana?

A. Yes, sir, you can't tell you are in a town only by the name. There is no town there.

Q. It is just a place in a town?

A. It is just a place, that is all.

Q. When I say in town, I meant the place you have marked as J-1 [22] on the map.

(Testimony of Elmer Johnson.)

A. It is just quonset huts is all there is.

Mr. Deasy: That's all.

Mr. Downey: That's all.

The Court: You said you were making about \$400 a month. A. Yes.

Q. What was your base pay?

A. It was \$1.72 an hour, and I think they figured base pay right at \$400 a month for the painting, and on the barbering I was making \$12 to \$15 a night.

Q. Referring to the painting, what did you do?

A. We went over there as direct painters, but they gave us spray guns.

Q. What were you painting, barracks and the like?

A. Everything—just old mess halls and the roughest kind of work. Even rougher than the shipyard work.

Q. How much did you send home to your wife and family? A. I sent it all.

Q. What did you live on?

A. Just took out barely enough for me to live.

Q. How long were you there?

A. I was there only a short time, about two weeks.

Q. And then this accident happened?

A. Yes, sir—just got started there.

Q. How old are you?

A. I will be 52 my next birthday. [23]

Q. Where were you born?

(Testimony of Elmer Johnson.)

A. I was born in Eagle, Idaho.

Q. Do you have relatives in Idaho?

A. Yes, my father and mother are dead.

Q. What are the occupations of your relatives?

A. I have a brother that has a ranch.

Q. Did you ever have anything to do on a ranch?

A. I was raised on a farm.

Q. And do you currently have occasion to see doctors about your condition?

A. The doctor said I should be under a doctor's care now?

Q. Why?

A. I have varicose veins right now all over the right leg.

Q. I notice you walk with a limp. You have an impairment there? A. Yes.

Q. Has that increased or decreased in intensity so far as your locomotion is concerned?

A. It has got—actually, after I took it out of the cast I couldn't walk at all. It has got a little better.

Q. Do you exercise your leg?

A. Yes, I do.

Q. Have you taken some therapy for it?

A. I tried it for two months and all of the doctors threw up their hands.

Q. What about the muscle structure? Has there been some rehabilitation [24] in the muscle structure of your leg?

(Testimony of Elmer Johnson.)

A. This big place never has filled in where all the muscle was taken off.

Mr. Downey: You might pull up your trouser leg.

The Witness: Yes, they have filled in a lot of air—that was one operation, and here is another one, and there is another one. And the ankle is what bothers me. All the ligaments are frozen and this leg is frozen about that far, and it wouldn't surprise me—if I want to get down, I have to lay on the floor if I want to look for my shoes.

The Court: How much time has elapsed from the accident up to now?

Mr. Downey: About 22 months.

The Court: There were no cranial injuries excepting on the side there was blood?

Mr. Downey: He was knocked unconscious, but Dr. Carlson will be here, and as I recall, his report didn't show any serious head injury.

The Court: Dr. Carlson came into the case recently, did he?

Mr. Downey: No, he came into this case and treated him.

The Court: I suppose he has been taking care of him as a charity patient?

Mr. Downey: No.

The Court: Did you pay him? [25]

A. He told me he would take care of me, but I got some bills, by the way, so I couldn't go down any more. I thought it was a misunderstanding, and I just didn't go down.

(Testimony of Elmer Johnson.)

Q. Did you have the money to pay him?

A. No.

Q. You didn't have \$8? A. No.

Q. Did you have any understanding with him at all concerning compensation for testifying, or otherwise? A. No, I should say not.

Redirect Examination

By Mr. Downey:

Q. Mr. Johnson, isn't it the fact that within the last two or three weeks when you came to see me you told me you had gotten bills from Dr. Carlson, and I phoned his office, and he had him send the bills over to me?

The Court: I am not reflecting on the doctor or you, Mr. Downey, but I just wanted to ascertain the fact.

Mr. Downey: The Oak Knoll Hospital has given him long treatments and haven't billed him for it. As to any recovery, the Government would be entitled to that, I don't know. They held he was entitled to treatment in any emergency on Guam, but over at Oak Knoll Hospital, I don't know.

The Court: That was the next point of my examination of this witness.

Q. Have you received any sums of money from the United States [26] Government for disability, or otherwise? A. No, sir.

Q. Have you made application?

A. Yes, I really have.

The Court: You undertook that, did you, Mr. Downey?

Mr. Downey: Yes, he came to see me on every occasion of the denial of compensation. I took steps to inquire in Washington and determined he had simply been turned down on the application.

The Court: Why did they turn him down?

Mr. Downey: Because it was Sunday and he was not working on painting on that day. They didn't object to his doing that, but he was receiving a like amount of pay for barbering, and they will not pay compensation if you are hurt other than in direct performance of your actual duty.

The Court: All right.

Mr. Downey: We have no other witnesses. All the sailors have been discharged from the Navy. The last word I heard was that Moore was in Tompkins, Louisiana, and we have not been able to locate him.

The Court: This case takes on serious proportions on the medical aspect. He has serious injuries of permanent nature. That is apparent to me on inspection of the case, as well as some other cases we have had of this character. I will hear from Dr. Carlson on that score. You might have the Oak Knoll [27] records available for the court.

Do you feel your client may be suffering from a neurosis arising out of this injury?

Mr. Downey: I think undoubtedly he is suffering from a neurosis. He is undoubtedly worried, and any man in that economic condition would be.

The Court: Wherein was there a departure from line of duty on the part of the driver in question?

Mr. Deasy: There is evidence that he told this plaintiff he had to turn in a daily report.

The following facts in the statement of fact have been admitted by the plaintiff to be true:

“That on December 22, 1946, when John F. Moore was an enlisted man, to-wit, a chief pharmacist’s mate in the United States Navy and was stationed on the Island of Guam, attached to the Fifth Service Depot, on duty at Eighth Ammunition Company.”

No. 2:

“That on the afternoon of December 22, 1946 John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot, to turn in his daily report. Before doing so he met the plaintiff, Elmer R. Johnson, and asked the plaintiff if he would like to come with him. He told the plaintiff that he would take plaintiff [27a] to plaintiff’s quarters at the Navy Air Base, Agana, and the plaintiff agreed to accompany Mr. Moore.”

No. 3:

“That after the conversation referred to in the statement No. 2, plaintiff Elmer R. Johnson and John F. Moore went into the Club Rooms at the Ground Ammunition Depot, where they met Seaman First Class Raymond J. Beulieu, Seaman First Class Homer L. Taylor, and Seaman Second Class William L. Barger. All engaged in conversation and several of the group consumed some beer.”

Those three statements were admitted. The next two statements were not admitted.

Mr. Downey: We will now admit statement No. 4 as being true.

Mr. Deasy: All right, Statement No. 4 reads:

“During the conversation referred to in Statement No. 3, mention was made of the fact that plaintiff was a barber, and the sailors asked plaintiff if he would cut their hair. The plaintiff said that he would if they would come to his quarters at the Naval Air Base.”

Mr. Downey: We now admit No. 5.

Mr. Deasy: All right, No. 5 reads:

“Plaintiff and the seamen asked John F. Moore if he would take them to plaintiff’s quarters, so that plaintiff might cut the seamen’s hair. Mr. Moore agreed to do so.” [27b]

Mr. Downey: That statement has been denied, but it re-reflects a kind of confusion. I believe we can admit it.

Thereafter, they all ate dinner. That is true, but it wasn’t eaten at that place.

The Court: With that noted correction, Mr. Downey, you will admit that, sometime during the course of the evening, they had dinner.

Mr. Downey: That’s right, but not at the place where the hair was cut.

Mr. Deasy: For the record, then, I will read that statement, which is No. 6:

“Thereafter, on December 22, 1946, plaintiff, John F. Moore and the three seamen referred to in statement No. 3, proceeded in a reconverted ambu-

lance belonging to the United States, with Moore driving the same, from the Ground Ammunition Depot to plaintiff's quarters at the Naval Airbase, where they alighted from the vehicle and plaintiff took the seamen to his quarters and cut their hair. Thereafter they all ate dinner."

The next three are admitted, your Honor.

No. 7 is:

"After eating dinner at the Naval Air Base, the seamen asked John F. Moore to take them back to their quarters at the Ground Ammunition Depot, which he agreed to do." [27c]

No. 8:

"While en route to the Ground Ammunition Depot, Seaman First Class Homer L. Taylor asked John F. Moore to drive to the Island Command Brig in order that Taylor might collect some money from one of the sentries at the Brig. Moore then drove the vehicle in which plaintiff and the three seamen were riding, to the Brig for this purpose."

No. 9 reads:

"After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. En route the vehicle in which they were riding overturned."

No. 10:

"At the time the vehicle overturned, John F. Moore had not yet turned in his daily report at the Fifth Service Depot Dispensary."

Those are admitted.

The Court: All right, I will hear Dr. Carlson this afternoon. [27d]

Afternoon Session

November 5, 1948—2 P.M.

Mr. Downey: May we proceed?

The Court Yes.

Mr. Downey: Dr. Carlson, will you be sworn?

F. J. CARLSON

called by the plaintiff, sworn.

The Clerk: Will you take the witness stand doctor. Will you state your full name?

A. F. J. Carlson.

Direct Examination

By Mr. Downey:

Q. Doctor, you are a duly licensed practicing physician in the State of California with your office in the City of Oakland, California?

A. Yes, sir.

Q. How long have you practiced medicine?

A. Since 1920.

Q. And you specialize in which branch?

A. Specialize in orthopedics.

Q. Now, you have examined Mr. Elmer Johnson, the plaintiff in this case, at my request, on more than one occasion, Doctor, is that right?

A. Yes.

Q. Will you please go ahead and tell his Honor what you know of the case from your examination, as well as, of course, any [28] history that you got as to injury?

(Testimony of F. J. Carlson.)

A. The patient came to my office on October 27, 1947. The history is that he sustained an accident on December 22, 1946, which resulted in compound fractures of the leg; that this had been treated by Naval surgeons, first on Guam and later at Oak Knoll Hospital; and when I saw him, he was about ready to be dismissed from the hospital.

The patient recounts three major steps of treatment: first, an immediate bone plating operation, using a metal plate. It was done on the day of injury. Second, a removal of the plate for non-union and grafting. Third, sectioning of the fibula, the smaller bone in the same leg to favor final and firm healing in the tibia.

These steps were accompanied by fixation each time. At the time I saw him on October 27, 1947, the cast had been removed and the doctor's opinion was that bony union was then progressive and would take place and become firm. This has later taken place.

My examination findings on October 27th were as follows: That's 1947.

“Patient had had a head injury which I could not substantiate in any particular manner. He had also had a shoulder injury, had essentially recovered and could not be particularly substantiated. He had a leg injury which had resulted [29] in stiffening of the knee and of the ankle; still showed persistent swelling in the leg and discoloration. It showed scars at the mid leg, actually three scars in

(Testimony of F. J. Carlson.)

the same area, and an additional scarring from surgery."

I have measurements of joint motion.

"Two surgical scars were present. One is on the inner side of the tibia just below the mid level, and this is apparently a composite of three scars. It is well healed and not inflammatory in appearance. The second is a thin well-healed small surgical scar over the lower end of the fibula.

"The calf muscles are very hard and do not move normally and are very thin. Knee action shows 175 over 180 degrees of extension, and 55 over 130 degrees of flexion. The ligaments in the knee are firm. The joint shows some fibrosis of the capsular structures. The blocking in flexion is not sharp. There is no large acute effusion of fluid in the joint.

"Ankle motions show a dorsal flexion of zero from a right angle; a plantar flexion of only about ten degrees. There is some additional foot mobility present at the metatarsal joint, approximately ten degrees. Subastragaloid motion [30] is about one-fourth of normal. This position and this limitation of motion in the ankle prevents the patient from walking by advancing the left or sound foot. Blocking of dorsal flexion prevents the opposite foot from taking a full stride, and the patient therefore gets no full weight bearing on the right leg."

At this time, I also made x-rays, which, perhaps, will be discussed on the lantern. The patient was in need of further treatment. Outlook for the pa-

(Testimony of F. J. Carlson.)

tient is not too discouraging. He needs a heel lift to begin walking. It would be sound to lift both heels to get the stride even. As ankle dorsal flexion is gained, the heels can be lowered. There will be residual stiffening in both ankle and knee joint, but he should gain sufficient function to walk on level ground without a limp. Hill climbing will be always difficult, and normal stair climbing painful.

Further treatments should be extended over months, rather than a few weeks. There is nothing that will substitute for time in restoring flexibility in the fibrosed muscle tissues in the cast.

I also discussed refracture, which is perhaps more remote now than then.

Q. When did you next see him, Doctor?

A. I have a record here of a visit on the 8th of December, a [31] few brief notes, not transcribed; another record on October 25, 1948, when I prepared a fairly complete summary of the findings then.

Q. What was his condition then, a couple weeks ago? A. (Reading)

“Right foot shows a plantar flexion of 30 or 45 degrees; dorsal flexion of zero over ten degrees. Subastragaloid motion in the heel is one-third normal. Some metatarsal motion is present in the right foot, not quite up to normal. There is also some impairment of dorsal flexion of the big toe, which shows approximately two-thirds normal range. All of these items serve to impair walking capacity,

(Testimony of F. J. Carlson.)

because of sufficient dorsal flexion in the several areas.

“The ankle metatarsal joint and big toe; the right ankle circumference at ten a.m. was 10 over $8\frac{1}{2}$ inches. The right calf circumference is $14\frac{1}{2}$ over $14\frac{1}{2}$. The measurement is not normal. It represents a combination of muscle atrophy and leg swelling, which exactly cancel out each other. The leg shows clusters of varicose veins, just now beginning to appear, when there is some relief from leg swelling. The entire lower third of the leg is brownish and somewhat indurated. Knee [32] flexion is 100 over 140 degrees. Knee extension is practically normal. The right knee grates on motion and shows some thickening of the joint capsule, but not acute fluid effusion. The patient had other complaints. He complains of a pain in the right groin, and is concerned over the return of a hernia, which was repaired by surgery many years ago. An examination was made, and I find soreness and a very minor impulse in the right inguinal ring, but not the large extruded hernia. I cannot know what this will eventually show. There are scars from an ancient hernial repair on both the left and right side. The patient complains of general headaches and stiff neck. The stiff neck is found.

“The forward stooping of the back permits finger tips 8 inches from the floor; side bending, 20 degrees to the right; back rotation is about 60 degrees; back gives an impression of both stiffness

(Testimony of F. J. Carlson.)

and lameness. Neck motions are also impaired. There is a minor degree of stiffening in both shoulders, but not at the elbows, fingers, or wrists.

“Tendon reflexions were observed. The knee jerks are present. The ankle jerks are absent; plantar reflexions were present. [33]

“The patient complains of loss of acuteness of sensation over the right leg from the mid-calf down, in a stocking pattern.

“I note also the large scarring over the back of the calf. The skin of the leg there is puckered by scars, one by 3 inches in area, brown discoloration. This is attached to the calf muscle group. This moves up and down with the effort to use these muscles. The muscles are obviously adherent to the scar, with a deep fibrous muscle scar. This is a further factor in limiting ankle dorsal flexion.”

Q. Well, how do you think he is going to get along—withdraw the question. What treatment, if any, is now indicated?

A. He should have more months of massage on ankle and knee and calf muscles. That would give him further relief from swelling and from some of the stiffening. Some of it will remain.

Q. That is what you just generally call physiotherapy?

A. Yes, it should be done by somebody who really wants to work with his hands on him; not simply with heat.

(Testimony of F. J. Carlson.)

Q. Assuming that such treatment is given, how do you think the leg is going to come out, from the standpoint of doing work such as truck driving, or work as a painter on roof-painting work, or any manual labor?

A. This man should not go back to painting on scaffolding. [34] He is insecure. Truck driving depends upon the job and the truck—a great deal of latitude there. He would certainly not be accepted by any large employer on a medical examination. There would be prejudice against him on the grounds of ineptness in truck driving.

Q. You do think that on level ground, though, that with proper treatment he can get so that he can walk without limping?

A. I expect him to discard the cane and to walk without a cane on level ground leisurely, and to show a limp on any hurrying, and show a limp on uneven ground. The limp will be based on ankle stiffening and on the heel stiffening, which has lost its side play. That is the subastragaloid joint.

Q. Would this massage be for the purpose of helping the circulation, or getting more motion in the ankle, or both?

A. Both. I am more interested in the motion than anything else, in relief from stiffening, and in ease of function over the regions that he now has.

Q. Did I understand you to say, sir, that he had a combination, not only of atrophy, but swelling at the same time?

(Testimony of F. J. Carlson.)

A. Yes, that's always true with these things. The flesh swells, and the muscles are thin and weak—but fleshy, mean fat, skin and filler material, which there is in various areas of the body, essentially fat tissues.

Q. I see. You have the x-rays with you?

A. Yes, sir. [35]

Q. Are those the ones you took just the last examination a couple of weeks ago or earlier?

(Witness goes to shadow box.)

Doctor, be sure and state, when you are referring to the x-ray, when it was taken, and by whose request.

A. The x-rays were taken by myself personally. They are dated by label printed in the film.

The Clerk: You might identify them.

Mr. Downey: Yes, if you are going to refer to this first one, which appears to have been taken October 25, 1947, we will have that marked as Exhibit—

The Clerk: Exhibit 2.

Mr. Downey: And the next one is also taken October 25, 1947; we will ask that that be Number 3.

Doctor, any of these duplicates, in what they show, I would rather not put into Evidence, unless the Court or Mr. Deasy requests it.

Number 3 will be the film the Doctor just handed me, bearing the date October 25, 1947.

The Clerk: Number 4.

(Testimony of F. J. Carlson.)

Mr. Downey: And he has handed me still another x-ray under the same date of October 25, 1947; that will be No. 5.

The Clerk: Five.

Mr. Downey: There is still another one, bearing the same date, which will be No. 6. [35-A]

The Clerk: Six.

Mr. Downey: Then, another picture bearing date of October 25, 1948, which we will ask be admitted as No. 7.

The Clerk: Seven.

Mr. Downey: These were taken exactly one year apart to date, I see; and there is a second one bearing the date of October 25, 1948.

The Clerk: Plaintiff's No. 8.

The Court: So ordered.

(The x-rays referred to were then marked Plaintiff's Exhibit Numbers 1 to 8 inclusive.)

Mr. Downey: Do you want these in, too?

A. Yes.

Q. (By Mr. Downey): Then, these are 9 and 10, respectively. They were both taken October 25, 1947.

All right, Doctor, would you get Exhibit 1 and point out to the Court what that shows?

The Court: Two, it is.

Q. (By Mr. Downey): Exhibit 2.

A. The picture of the right knee of the patient. I point out the even and fairly well preserved joint

(Testimony of F. J. Carlson.)

space, and not too severe a loss of mineral in the tibia; and the fracture at the neck of the fibula.

The next film, Exhibit 3, is part of a pair. It shows [36] identically the same thing.

Exhibit 4 is the side view of the same knee. This brings out mottling in the kneecap, and to some extent in the tibia—otherwise, good joint spaces. It brings out also the fibular neck fracture.

Exhibit 5 is the mid-leg. The large bone is the tibia. A transverse fracture line is seen through the whole width, practically, in this film. There are six screw holes in both shells of the bone, giving the appearance of twelve holes, the marks of the metal plating, the mark of the delay in healing. There is a considerable amount of hard callous formed, which has not served to obliterate the fracture line. The point on the fracture line indicates fibrous play at some time fairly recently.

Number 6 is the leg at the same level, and at the same time on October, 1947. Now, this film gives the appearance of about half-width healing. This area roughened here represents approximately the place where the middle plate had been. This mound represents a bone-grafting operation, very clearly placed on the opposite from the former plating. This was originally a transplant of bone from the patient's iliac, reset, or set in here. The details of that dissection are obliterated by a large, thick callous. This picture is taken at the same time as the one previously described, showing a full frac-

(Testimony of F. J. Carlson.)

ture line across the whole width. They are the same day. It illustrates [37] the fact that the films are ambiguous sometimes. This is a fracture, or possibly the sectioning operation done in the fibula. The fracture in the upper fibular neck of it may have been the sectional operation, rather than the original fracture.

Number 7 is a year later, October, 1948; smooth, firm callous on both sides; rather thick, dense, white callous. The fibrous line is not visible, as seen before. The alignment of the leg is adequate; satisfactory—the fibular alignment in this view, at least, looks good. The picture is free from evidence of bone infection.

Exhibit 8 is the same leg at the same level on another angle. No fracture line is seen. This picture is free from evidence of decayed or dead bone. This line represents not actual disease, but what was produced by the bone-plating operation.

Exhibit 9 is a picture of the patient's entire foot in 1947, a year ago. It was taken to determine how much disturbance there was in the ankle joint. It has a relatively good joint space, and offers the hope that some further motion should be restored. The mottling is the inevitable result of long disuse and long treatment.

Q. There was no fracture in the foot?

A. No fracture in the foot. This foot is the quite lame part of the disability. [38]

(Testimony of F. J. Carlson.)

Q. That just comes from the fact that he had it in a cast and wasn't using it for long?

A. The swelling resulted from several surgical operations and various other factors.

Exhibit 10 is an A. T. view of the foot. The metatarsal joints are present, may be restored. The metatarsal bones are mottled by mineral absorption, but may be restored by use.

That is all.

Mr. Downey: Did you have any questions on the x-rays, Mr. Deasy?

Mr. Deasy: No.

(The witness returns to the witness stand.)

Mr. Downey: I don't think I have any——

Q. Incidentally, you sent him to an ear specialist in Oakland, who determined that there had been no loss of hearing from the injury to his head?

A. I sent him to the ear specialist, and I have his report.

Mr. Downey: Well, is there any objection to his referring to that?

Mr. Deasy: No, I have no objection.

The Court: You might state the conclusions shown by the report, Doctor.

The Witness (Reading): The report is made by Doctor Albert Bowles, Captain Albert Bowles of the U. S. Navy.

“His hearing loss is not particularly disabling, and certainly not sufficient to warrant a hearing aid. I see no reason why his hearing disability

(Testimony of F. J. Carlson.)

should get worse any faster than which we usually ascribe to oncoming years of middle age. The audiogram reading 4.2% loss of hearing in the right ear, and 7% loss of hearing in the left ear.”

Q. In any event, Doctor, that loss as occasioned, according to Doctor Bowles, was not the result of this accident?

A. The Doctor is noncommittal on the point, at least wishes to entertain no definite opinion on it.

Q. Yes.

Mr. Downey: I think that is all.

Cross-Examination

By Mr. Deasy:

Q. Doctor, did you find, on your recent examination, any evidence of osteomyelitis in the leg?

A. No, sir.

Q. It would be your opinion that there would or would not be such a condition developed in the future?

A. He will not develop osteomyelitis. It would be very unusual. The healing has been marked by successful surgical healing each time he has been operated on; and, while it was originally a compound fracture, it has never been complicated by more infection than it would warrant. It was apparently controlled, to begin with.

Q. You feel that, as far as the bones of the leg are concerned, [40] that the prognosis is favorable in that regard, is that right? A. Yes.

Q. And that the man's difficulty will be rather

(Testimony of F. J. Carlson.)

a loss of motion, a loss of limitation of motion in the leg?

A. The man's difficulty will not be based on osteomyelitis, and loss of motion is a major one. Another one is swelling and some discomfort. Persistent swelling, which still shows, is work-incapacitating, and with advancing years it may be more marked.

Q. What was the swelling caused by, in your opinion, at this time?

A. Originally from injury and the necessary surgical treatment until it becomes so chronic that it remains.

Q. Well, is that from some disturbance in circulation, or something of that kind?

A. Yes, he has a disturbance in circulation, consisting of varicose veins; but, quite apart from that, these old, long, leg cases show persistent swelling.

Q. That's something that you expect where there has been fracture of the bones of the leg and repeated treatment?

A. Yes, the age is a large factor in the degree of swelling that remains. When it comes to the middle years, when heart function begins to show less reserve, then the swelling is more persistent.

Q. In your opinion, you feel that he should not, by reason of his condition, return to such an occupation as painting, [41] which would require his climbing ladders, working on scaffolding, or anything of that kind?

(Testimony of F. J. Carlson.)

A. That's true. That is based on his insecurity, his hazard of tripping and coming off balance on this ankle and heel.

Mr. Deasy: I have no further questions.

Mr. Downey: Does the Court have any questions?

The Court: No, I haven't.

Mr. Downey: All right, Doctor, that is all. Thank you.

The Court: I believe I have one, Doctor.

Q. It may appear in the testimony, or it may not: What would be your reasonable estimate of the continuity of treatment, the therapy suggested by you, a year or eighteen months?

A. A year would be a very generous allowance. He should be able to gain all he can in that time.

Q. You have in mind manual manipulation?

A. Massage; spending a considerable period of time over it, not forcing it suddenly and severely and doing a lot at once.

The Court: All right. Thank you, Doctor.

Mr. Downey: Your Honor, I have here a copy furnished me by Mr. Deasy——

The Court: By-the-way, do you have the Oak Knoll records available?

Mr. Downey: No, sir. There is the Guam medical treatment record of the operation there, I guess, up to the time he went [42] to Honolulu, and it's under date of the 21st of June, 1947; seems to be a

summary of the treatment given and the record made.

The Court: May it be stipulated and conceded that there is no claim made herein for hospitalization or medical expense, save and except whatever expense there may be for the doctor?

Mr. Downey: There is no claim at all, sir. I think that he was entitled to treatment at Oak Knoll in some way.

The Court: Let me ask you this question: Upon what basis of principle did Oak Knoll accord this man treatment when they assumed to deny liability on the other hand?

Mr. Downey: I don't know, sir. I asked him that; he has asked me that, and——

The Court: There was an implied admission of liability by reason of the fact that they undertook to treat the man and gave him a good treatment.

Mr. Deasy: I feel, Your Honor, in that regard——well, the man was injured on an island, which is completely in control of the Navy——

The Court: Yes.

Mr. Deasy (Continuing): ——and whether or not he was entitled to compensation depends, of course, on whether or not he was injured in the course of his employment; and that apparently was determined adversely. Now, when that determination was made, I don't know, but the man arrived at the [43] hospital there an emergency case, and they took care of him until they felt, according to the report Mr. Downey has here, he should be evacu-

ated to the Mainland because of the long period of convalescence required. In other words, it was something in the nature of emergency treatment; and I presume, like many doctors, once they started treating him, they were interested in seeing what the eventual outcome would be, and discontinued to afford him out-patient treatment.

The Court: Yes; if there be an additional matter, Mr. Downey or Mr. Deasy, concerning which you desire a stipulation, I suggest that you embrace it in a stipulation concerning the records of Oak Knoll.

Mr. Downey: I don't find the Oak Knoll file up to date, but that which I have had since November 17, 1947, may I ask that that be admitted?

The Court: It may be admitted, if there is no objection.

Mr. Deasy: I am not familiar with what it is; but if it is a record of treatment afforded to him——

The Court: There is no issue on that score.

Mr. Deasy: I don't think that there is any question that he was treated by the Navy; and apparently, from what the Doctor says, they did a pretty good job; and I might state that I have been waiting to receive a copy of the medical report of the examination yesterday, and that may be also offered in evidence when I have received it and had [44] a chance to look it over.

The Court: Yes.

Mr. Deasy: Now, if Mr. Downey has concluded the presentation of his case for the record, I have a motion which I would like to make.

The Court: All right. Mr. Downey, do you submit the matter on the evidence?

Mr. Downey: Yes, with the additional records.

The Court: The records may remain open for that purpose.

The Court: Do you have a motion?

Mr. Deasy: Yes sir, Your Honor. At this time, I would like to have, on behalf of the defendant, United States of America, to move the Court for a judgment in favor of the defendant, upon the grounds, first, that the evidence does not establish the defendant was injured by any act or omission of an employee or an agent of the United States, or member of the Armed Forces, acting in the scope of its employment, or in the line of duty; and, secondly, upon the grounds that the evidence does not establish that there was any act or omission constituting carelessness or negligence, or any wrongful act or omission, on the part of John Moore, Chief Pharmacist's Mate in the United States Navy, which is shown by the evidence, that he was operating the vehicle in which the plaintiff was riding at the time he was injured.

The Court: The motion is denied. [45]

Do you have those two statements in the file, or have they been admitted in evidence?

Mr. Deasy: I have a statement, Your Honor, from the driver of the vehicle—John Moore, the driver of the vehicle, which I think should be read into evidence. It is quite short.

The Court: All right, sir.

Mr. Deasy: Mr. Downey and I stipulated at the time of the pre-trial conference that if John S.

Moore, Chief Pharmacist's Mate, United States Navy, were called and sworn as a witness on behalf of the Government in this case, that he would testify as follows:

"On 22, December, 1946, I was going to go to the dispensary at the Fifth Service Depot to take in my daily report. I asked Ray Johnson, a civilian friend of mine, to go with me, and I told him I would take him to his quarters at the Naval Air Base, Agana. Just before we left, we met three sailors from Naval Ammunition Depot. During our conversation with them, they learned that Johnson was a barber and asked him if we would cut their hair. He said he would if they would come to his quarters; so he took all of them to his quarters, where he cut their hair. It was then chow time, so we ate chow there. Then I agreed to take them [46] back to the Naval Ammunition Depot. One of them wanted to stop at the Island Command Brig to collect some money. We stopped there and started back to the Naval Ammunition Depot. We had not gone very far when the truck started to slide. I tried to keep control, but could not. I do not remember what happened after that."

And I would like to offer this in evidence, Your Honor—the request for admission of facts and the plaintiff's reply thereto, which are on file in the case, and which were read this morning during the arguments that we had.

The Court: I would suggest that they be marked appropriately in evidence also.

The Clerk: They will be marked, if Your Honor please, Defendant's A and B, respectively.

(Request for admission of facts and plaintiff's reply thereto marked Defendant's Exhibits A and B, respectively.)

Mr. Downey: I would like the record to show, in addition to admission which was made in response, and the request for admission of the facts, which is dated 26, May, 1948, this morning, the plaintiff, through his Counsel, admitted as a true statement number 4, statement number 5, and statement——

The Court: Qualified, however, as to 5.

Mr. Downey: No, it was as to 6; and statement that number 6 with the exception that the words, "thereafter they all [47] ate dinner"——

The Court: No, 6 was qualified—no, 5 was an absolute admission—no, 6 qualified as indicated. All right.

Is that your defense, now?

Mr. Deasy: Yes, sir, Your Honor, with the exception that I would like to offer the medical report of the re-examination of the defendant.

Mr. Downey: There will be no objection to that.

The Court: Made by whom?

Mr. Deasy: The doctors at Oak Knoll yesterday.

The Court: You will submit a copy to Mr. Downey?

Mr. Deasy: I will.

The Court: Then, respective Counsel may submit them on both sides.

Mr. Downey: May I have, say, five days to submit?

The Court: I would say you had better take ten days on each side.

Mr. Deasy: All right, Your Honor.

The Court: Then, the matter will be submitted.

The Clerk: May it be continued on the Calendar to December 6th?

Mr. Downey: For submission?

The Clerk: Submission, so I will be sure the briefs are all in.

The Court: Yes, Mr. Downey, you apparently overlooked [48] a schedule of the moneys.

Mr. Downey: Yes, sir.

The Court: You might supply that in the interim.

Mr. Downey: The plaintiff told me that on consultation with his wife, and his best recollection without the written records available, he figures that it amounts to about \$500.00 earned since the date of the accident.

The Court: \$500.00.

Mr. Downey: Which was all earned in Alaska. I can call him back to testify.

Mr. Deasy: We will stipulate that if he were called, he would testify that his earnings since the accident were approximately \$500.00.

The Court: So ordered. That may be entered in the record.

CERTIFICATE OF REPORTER

I, F. J. Sherry, Official Reporter, certify that the foregoing 49 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ F. J. SHERRY. [49]

[Endorsed]: No. 12238. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Elmer R. Johnson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 9, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12238

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER R. JOHNSON,
Appellee.

DESIGNATION FOR PRINTING OF
RECORD ON APPEAL

To: the Clerk of the above-entitled Court and to
Messrs. Hildebrand, Bills & McLeod, and
Sheridan Downey, Jr., Attorneys for appellee:

Appellant hereby designates all of the record on
appeal as the record to be printed.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed May 12, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF POINTS TO BE RELIED
ON IN THE APPEAL OF THE ABOVE-
ENTITLED CASE

The Appellant hereby adopts the statement of points filed in the District Court and contained in the record docketed in this Court as its statement of points to be relied on in the appeal of the above-entitled case and hereby designates the said points as the points designated and to be relied on in said appeal.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed May 12, 1949.